

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,)	
)	
Plaintiff,)	
)	CASE NO. 1:19-CV-1041
v.)	
)	HON. ROBERT J. JONKER
NCR CORPORATION,)	
)	
Defendant.)	
)	

NCR’s Reply Memorandum of Law in Support of Entry of the Consent Decree

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Defendant NCR Corporation (“NCR”) respectfully submits this reply brief in support of the entry of the Consent Decree (“CD”) between NCR and the United States and the State of Michigan (together, the “Government”) and in response to the memorandum submitted by Georgia-Pacific LLC and Georgia-Pacific Consumer Products, LP (“GP”) objecting to the CD, and certain comments submitted by International Paper Co. (“IP”) and Weyerhaeuser Co. (“Weyerhaeuser”) in response to the Government’s Motion to Enter the CD.

PRELIMINARY STATEMENT

The CD between NCR and the Government represents years of arms-length negotiations culminating in substantial commitments on behalf of NCR in exchange for resolving its liability with respect to the Allied Paper/Portage Creek/Kalamazoo River Superfund Site (the “Site”). Under the CD, NCR has committed to pay a significant amount of money, and it has already begun the process of performing the substantial work required under the CD. In addition, NCR has agreed to pay the nearly \$20 million judgment in favor of GP and to give up its appeal that could have reduced its liability to zero. The agreement is targeted to address some of the most urgent Site needs immediately, and represents NCR’s commitment to step up to the plate and end this decades-long dispute, in contrast with other potentially responsible parties (“PRPs”) who have not settled or have insisted on working only under Unilateral Administrative Orders (“UAOs”). The CD is demonstrably fair.¹ It is telling that GP stands alone in contesting the fairness of the CD, which has the full support of the DOJ, the EPA, the State of Michigan, and all responsible Natural Resources Trustees.

¹ Again, NCR endorses the Government’s position on the fairness of the CD, and submits this memorandum primarily to address GP’s arguments with regard to CERCLA §§ 107 and 113.

As detailed in its opening brief, NCR has agreed to the terms of the CD in exchange for *completely* resolving its liability at the Site. For any PRP, the incentive for entering into a CD is primarily the contribution protection the government offers in return. Otherwise, these deals do not happen. Ignoring this, GP now seeks the Court's blessing to assert claims against NCR under § 107, simply because GP does not like the terms of NCR's negotiated agreement. GP should not be permitted to frustrate the purpose of CERCLA by eviscerating the robust contribution protection that appears in the text of the CD.

ARGUMENT

I. GP Misconstrues this Court's June 19, 2018, Order.

GP suggests that "NCR's reading of the Court's order on the form of the judgment is . . . implausible". (GP's Br. in Opp. to the United States' Mot. to Enter the Proposed CD with NCR Corp., ("GP Opp.") ECF No. 32, at 30, PageID.505.) GP ignores the plain meaning of the Court's words. The Court noted it was asked "how to frame the scope of declaratory relief for future response costs incurred by one or more parties". (Order Regarding Final J., 1:11-cv-00483, (W.D. Mich. June 19, 2018), ECF No. 924, ("Order Regarding Final J.") at 5, PageID.34742.) With respect to this issue, "Georgia-Pacific want[ed] to limit the declaratory judgment to every other party's liability to Georgia-Pacific for future response costs, and say nothing about Georgia-Pacific's liability to the others." (*Id.* at 6, PageID.34743.) This was rejected: "Once again, in the Court's view, the Georgia-Pacific proposal conflates liability itself under CERCLA § 107, with responsibility to pay or reimburse particular costs regardless of the liable party that initially incurs them. The Court has found all the parties liable under CERCLA § 107, which means each is liable for all response costs at the 'facility.' In this case the

entire Site constitutes the ‘facility’”. (*Id.*) The Court then explained: “Here, all parties are liable in the Court’s view, and even though the liability is established and defined by CERCLA § 107, the ultimate responsibility is handled in contribution under CERCLA § 113(g)(3), *not cost recovery under Sections 107.*” (*Id.* at 7, PageID.34744 (emphasis added).) Thus it is clear that the Court found liability as to all parties under § 107,² and left only § 113 actions as the vehicle for dividing the future costs. NCR respectfully submits it was entitled to rely on this ruling when it decided to execute the CD.

II. NCR Is Entitled to the Full Contribution Protection it Negotiated and Received.

The statute is clear—a private party may file a contribution claim under § 113(f): (1) “during or following any civil action” under §§ 106 or 107(a), *see* 42 U.S.C. § 9613(f)(1); or (2) after resolving its liability to the government in an “administrative or judicially approved settlement”, *see* 42 U.S.C. § 9613(f)(3)(B). A party “must proceed under § 113(f) if they meet one of that section’s statutory triggers”. *Hobart Corp. v. Waste Mgmt. of Ohio*, 758 F.3d 757, 767 (6th Cir. 2014). GP itself agrees. (GP Opp., at 31, PageID.505 (“And if a PRP meets one of the triggers for contribution, it must pursue the costs associated with that trigger under Section 113(f).”))

Any suit that GP, IP, or Weyerhaeuser could bring at this stage would certainly be “during or following” a number of “civil actions” under § 107. As discussed in NCR’s opening brief, GP brought its lawsuit concerning the Site in 2010, asserting § 107 claims against NCR, IP, and Weyerhaeuser. *See, Georgia-Pac. Consumer Prods., LP, et al. v. NCR Corp., et al.*, Case No. 1:11-cv-00483. Weyerhaeuser asserted

² Given GP’s location at the top of the river and the undisputed evidence of the massive PCB discharges from its mills and landfills over many decades, the liability finding as to GP was certainly correct.

counterclaims and cross-claims against the other parties for “contribution or other recovery under CERCLA” if it were held liable for more than its fair share of response costs. (Def. Weyerhaeuser’s Ans., *Georgia-Pac. Consumer Prods., LP v. NCR Corp.*, No. 1:11-cv-00483 (W.D. Mich. Sept. 2, 2011), ECF No. 105, at 57, PageID.1562.) IP asserted counterclaims and cross-claims against the other parties under CERCLA § 107 and § 113. (Def. IP Ans., *Georgia-Pac. Consumer Prods., LP*, No. 1:11-cv-00483 (W.D. Mich. July 25, 2011), ECF No. 91, at 88-89, PageID.1451-1452.) All of these legal proceedings constitute separate triggers for § 113(f).

In addition, the Court’s finding of liability under § 107 meets the statutory trigger of § 113(f)(1). Here, GP continues to “conflate[] liability itself under CERCLA § 107 with responsibility to pay or reimburse particular costs”. (Order Regarding Final J. at 6, PageID.34743.) GP suggests “[t]he Government and NCR attempt to extend this principle, arguing that once Georgia-Pacific has incurred liability for *some* costs at the Site, it must categorically proceed in contribution for *all* expenses it has incurred at the Site.” (GP Opp. at 31, PageID.505.) GP ignores that it, along with the other PRPs, *has been found liable by this Court for all costs at the entire Site*. (Order Regarding Final J. at 6, PageID.34743. (“The Court has found all the parties liable under CERCLA § 107, which means each is liable for all response costs at the ‘facility.’ In this case the entire Site constitutes the ‘facility’.”).) Thus, NCR and the Government are only following the rules specified in CERCLA and are not attempting to expand any legal principle. By pretending the Court ruled differently, GP is attempting to evade the simple fact that any GP attempt to recover future costs would now be “during or following a civil action” involving all costs at the entire Site.

Until NCR's settlement with the Government, GP acted as though it fully understood the current "during or following" posture, which requires GP to proceed only in contribution to recover future costs. Following this Court's June 19, 2018 decision, on August 10, 2018, GP filed a petition for further relief seeking "an allocation of responsibility for those costs [incurred by GP under the 2016 Area 3 TCRA UAO] pursuant to CERCLA § 113(f) among Georgia-Pacific and Defendants NCR Corporation, International Paper Co., and Weyerhaeuser Co." (Pet. for Further Relief Consistent with the Ct.'s June 18, 2018 Decl. J., *Georgia-Pac. Consumer Prods., LP*, No. 1:11-cv-00483 (W.D. Mich. Aug. 10, 2018), ECF No. 952, PageID.35226-35231 ("GP's Pet. for Further Relief") (emphasis added).) Even though in this petition GP sought to allocate costs it was incurring pursuant to a UAO, for costs it incurred following the initial judgment, GP brought its claim only under § 113, and not § 107. In its memorandum, GP provides no reason why it should now be allowed to do an about face, change § 113 to § 107 in its petition, and thereby evade the contribution protection specified in the CD.

Notably, the contribution protection in the CD specifically bars this and any other claim by GP for future costs. (ECF No. 2-1 at ¶ 94, PageID.54. ("The 'matters addressed' in this CD include Natural Resource Damages and all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the Site, including any claims against [NCR] for the imposition or allocation of any costs (other than the judgment for past costs and interest imposed on [NCR] on June 19, 2018) *that have been or could be asserted in Case No. 1:11-cv-00483, including, without limitation the Petition for Further Relief filed by GP*

on August 10, 2018.”) (emphasis added).) Thus, the text of the CD evidences the parties’ intent to bar claims against NCR for future costs, however they might be pleaded.

III. The Cases Cited by GP Are Distinguishable.

As NCR stated in its brief in further support of the CD, we are not aware of any case, in any court, in which a PRP, having been found liable for all costs at an entire Site, has been permitted to bring a subsequent cost-recovery action against a PRP that has settled with the government to resolve liability for the site in question. (*See* NCR’s Mem. ISO Entry of CD, ECF No. 26.) In response to this challenge, IP and Weyerhaeuser cite no cases, and GP cites inapposite cases.

GP claims its cases demonstrate that “plaintiffs may appropriately bring cost recovery actions for expenses separate from those for which the plaintiff possesses contribution rights”. (GP’s Opp. at 32-33, PageID.506-7.) GP then argues it is entitled to do the same here. GP ignores the essential distinction: *GP has already been found liable for all costs related to the entire Site*. Any attempt by GP to recover costs related to the Site will now come “during or following a civil action” which addressed them. It must now proceed only in contribution if it wants to share its expenses with others. Again, this is what the Court has explicitly ruled.

All of GP’s cases are distinguishable on this basis. GP suggests that *Whittaker Corp. v. United States*, 825 F.3d 1002 (9th Cir. 2016), “teach[es] that ‘even where one of the statutory triggers for a contribution claim has occurred for certain expenses at a site, a party may still bring a cost recovery action for its other expenses’”. (GP Opp. at 31, PageID.505.) In the *Whittaker* case, Whittaker had previously been found liable “for a specific set of the plaintiffs’ costs of responding to Whittaker’s pollution; Whittaker was never ordered in *Castaic Lake* to clean up the Bermite Site.”

825 F. 3d at 1005. It was because Whittaker later sought compensation for costs that were *outside* the scope of its liability finding that the court in that case permitted Whittaker to seek cost recovery for *only those costs for which it had not previously been found liable*. *Id.* at 1013. Unlike Whittaker, GP *has* been found liable for all costs related to the entire Site. It cannot therefore use § 107 for costs that are the subject of its liability finding, *i.e.*, any costs related to the cleanup of the entire Site.

GP cites *Bernstein v. Bankert*, 733 F.3d 190 (7th Cir. 2012), as an example of an instance in which a PRP who incurred some cleanup costs as a result of a finalized settlement was permitted to bring cost recovery actions for costs pursuant to an unfinalized agreement. (GP Opp. at 32, PageID.506.) But GP again ignores the essential distinction. In *Bernstein* the court permitted a cost recovery action that sought compensation for expenses related to an unfinalized agreement, which were *separate* from the costs associated with its liability outlined in the § 113-triggering finalized agreement. 733 F.3d at 208-14. GP uses this case as an attempt to suggest it should be permitted to bring a cost recovery action for costs which *are* encompassed by the liability finding against GP. That is untenable.

GP next cites *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*, 602 F.3d 204 (3rd Cir. 2010), as a case in which “a plaintiff could bring a cost recovery claim for voluntary costs at one Operational Unit of a Superfund site even though it had incurred liability at a separate Operational Unit following an EPA section 107 suit.” (GP Opp. at 32, PageID.506). Again, this case is not analogous to GP’s situation. The plaintiff in *Agere Systems* was found liable only with respect to one Operational Unit, and could therefore bring a cost recovery claim with respect to costs

associated with a different Operational Unit. 602 F.3d at 225-27. GP has been found liable for all costs for the entire Site—there is no Operational Unit at Kalamazoo with respect to which § 113 has not been triggered.

GP cites *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004), for the proposition that “costs or damages” referenced in § 113(g)(3)(A), which defines the statute of limitations for a contribution action, refers only to “the costs or damages contained in the ‘judgment’ mentioned” in that subparagraph, not to “any response costs or damages that could arise in the future.” *Id.* at 13; GP Opp. at 33, PageID.507. The court in *Am. Cyanamid* was considering whether “a judgment for soil remediation [would] trigger the statute of limitations for contribution claims relating to groundwater remediation.” *Am. Cyanamid*, 381 F.3d at 14. No judgment had yet been issued regarding groundwater remediation, which was the issue before the court in *Am. Cyanamid*. In fact, following the judgment regarding soil remediation, the *Am. Cyanamid* court recognized that, “R&H could not, however, seek contribution relating to the soil remediation from the Capuanos because the Capuanos had settled with the government regarding costs associated with soil remediation, and, as discussed earlier, settling parties are immune from contribution suits regarding matters addressed in the settlement.” *Id.* The court in *Am. Cyanamid* therefore correctly observed that the Capuanos’ contribution protection, and R&H’s limitation to an action in contribution as opposed to cost recovery, was limited to the subject of the prior judgment and consent decree, *i.e.* soil remediation costs, and did not extend to different costs that were beyond

the scope of the prior liability finding and consent decree. Here, all costs in question are precisely those covered by the Court's finding of liability and the terms of the CD.³

Thus, while GP claims "each of the forgoing cases" demonstrates that GP can parse out liability into contribution versus cost recovery "by any subset of the Site or division of particular project costs" (GP Opp. at 33, PageID.507), none do so on facts that are similar to GP's position here. What these cases demonstrate is that a PRP must bring a contribution action, and *only* a contribution action, when the expenditure in question is premised on liability that is the subject of a judgment or judicially binding settlement. Because GP has liability for the entire Site, its only claims against NCR for future costs at the Site would sound in contribution, which are barred by the CD as to NCR.

IV. GP Is Also Incorrect About Unilateral Administrative Orders.

As NCR pointed out in its initial brief, precedent exists for holding that a UAO is a "civil action under § 106" and is therefore sufficient to trigger § 113(f)(1). *See Carrier Corp. v. Piper*, 460 F.Supp.2d 827, 841 (W.D. Tenn. 2006) ("the Court finds that a UAO falls within the requirement of a 'civil action' under § 113(f)(1)"); *PCS Nitrogen*,

³ GP also relies on *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552 (6th Cir. 2007). GP writes that the Sixth Circuit "agreed with [the *Am. Cyanamid*] approach 'because we likewise construe such costs or damages in § 113(g)(3)(B) to refer only to those costs or damages imposed by the judicially approved settlement.'" (GP Opp. at 33, PageID.507.) This decision actually supports NCR's position and reading of *Am. Cyanamid*. RSR and several other PRPs entered into a consent decree with the government, agreeing to reimburse the United States for a defined amount of past response costs and to "finance and perform" the remedial work that would be needed to clean up the site, and to undertake "further response actions to the extent necessary" to clean the site, as well as to pay up to \$150,000 in future response costs. *RSR Corp.*, 496 F.3d at 554. RSR and its co-defendants finished cleaning up the site two years later, and two years after that, RSR filed a contribution action against Commercial Metals. Commercial Metals moved to dismiss on the ground that this action was barred by the statute of limitations. *Id.* The district court agreed, and RSR appealed. The Sixth Circuit upheld the dismissal, finding that the consent decree constituted a "judicially approved settlement" triggering § 113. *Id.* at 556. The court relied on *Am. Cyanamid* to support the proposition that § 113(g)(3)(A) refers to the scope of the judgment or settlement triggering § 113 and dismissed the complaint as untimely. *Id.* Here too, any costs GP might seek from NCR are already the subject of the judgment issued in GP's suit, and thus may be pursued only in a contribution action, which is barred by the CD as to NCR.

Inc. v. Ross Dev. Corp., 104 F.Supp.3d 729, 742 (D.S.C. 2015) (same). And in the Sixth Circuit, the only case to consider the issue has agreed. *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998). The court held that even where costs were incurred pursuant to a UAO, “[c]laims by PRPs . . . seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in § 113(f).” *Id.* at 350. As GP points out, this case was decided before the Supreme Court’s decisions in *Cooper Industries* and *Atlantic Research*, and GP is correct that, to the extent the court held that one PRP can never bring a § 107(a) cost recovery action against another PRP, it is no longer good law. *U.S. v. Atlantic Research*, 551 U.S. 128, 136 (2007) (“the plain language of [§ 107(a)(4)(B)] authorizes cost-recovery actions by any private party, including PRPs.”). But this does *not* negate the conclusion of the *Centerior* Court that a UAO triggers § 113. *See, Hobart Corp. v. Dayton Power & Light Co.*, 336 F. Supp. 888, 896 (S.D. Ohio 2018) (“The Sixth Circuit’s holding in *Centerior*, that a UAO requiring cleanup by a PRP gives rise to a claim of contribution under § 113(f)(1), 153 F.3d at 351-52, appears to adhere to this [view that a UAO constitutes a civil action under § 106 triggering § 113].”). Thus, to the extent GP incurred or will incur future costs pursuant to a UAO, the only mechanism to recover these costs from others would be a § 113 claim, which the CD bars as to NCR.

V. The Issue Is Ripe.

GP suggests that the issue of whether the non-settling PRPs retain any cost recovery rights against NCR with respect to the Site is not ripe. (GP Opp. at 27, PageID.501.) Weyerhaeuser and IP suggest the same. (Weyerhaeuser’s Response to Motion to Enter CD, ECF No. 31, at 4-6, PageID.462-4; IP Response to United States’ Mot. to Enter CD with NCR and to NCR’s Memo. of Law In Support of Entry of CD,

ECF No. 30, at 7-8, PageID.456-7.) But it was GP, not NCR, that first put this issue before the Court. In GP's initial public comments, it specifically asked that "[t]he Consent Decree . . . expressly acknowledge that its contribution-protection provisions do not foreclose other PRPs from pursuing section-107 claims against NCR in the future." (GP Public Comments, ECF No. 11-1 at KZ023, PageID.328.) GP has therefore made the issue ripe by requesting this change to the CD, which required the Government to address it (fully supporting NCR) when it moved to enter the CD. GP's request is in direct contradiction to the language of the CD, which includes GP's Petition for Further Relief, or any similar potential relief sought, in the scope of NCR's contribution protection. Therefore, the question presented is appropriate for resolution now.

CONCLUSION

For the reasons outlined above, and in the Government's submissions, this Court should enter the CD as submitted, and confirm that GP has no further right to seek any future costs from NCR, under § 107 or otherwise, for any part of the Site.

August 13, 2020

Respectfully submitted,

DICKINSON WRIGHT PLLC (GRAND RAPIDS)

by */s/ Geoffrey A. Fields*

Geoffrey A. Fields

Attorneys for Defendant NCR Corporation
200 Ottawa Ave., NW, Ste. 1000
Grand Rapids, MI 49503
(616) 458-1300
gfields@dickinsonwright.com

CRAVATH, SWAINE & MOORE LLP

by */s/ Darin P. McAtee*

Darin P. McAtee

Attorneys for Defendant NCR Corporation
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
(212) 474-1000
dmcatee@cravath.com

Pursuant to Local Civil Rule 7.2(b), I certify that this Brief In Response contains 3,553 words, all inclusive.

Dated: August 13, 2020

By: *Geoffrey A. Fields*

Geoffrey A. Fields (P41788)